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DEL MAR SEAFOODS, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

DEL MAR SEAFOODS, INC.

Case No.: CV 07-02952 WHA

Plaintiff.

**PLAINTIFF'S MOTION FOR LEAVE
TO FILE MOTION FOR
RECONSIDERATION OF ORDER
VACATING ARREST**

BARRY COHEN, CHRIS COHEN (aka CHRISTENE COHEN), *in personam* and F/V POINT LOMA, Official Number 515298, a 1968 steel-hulled, 126-gross ton 70.8- foot long fishing vessel, her engines tackle, furniture, apparel, etc., *in rem*, and Does 1-10.

Defendants.

And Related Counterclaims

Plaintiff DEL MAR SEAFOODS, INC. ("Del Mar") submits this motion for leave to file a motion for reconsideration of the Court's Order dated August 16, 2007 granting Defendant's Motion to Vacate Arrest.

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1 **I. THE BASIS FOR THIS MOTION**

2 Pursuant to Local Rule 7-9 (b)(3), this Motion is made on the grounds that the Court
 3 failed to consider material facts and dispositive legal arguments which were presented to the
 4 Court before the Court issued its Order. The material facts and dispositive legal arguments
 5 the Court did not consider are that:

- 6 1) The terms of the Promissory Note and the Mortgage do not relieve the defendants
 of their obligation to make monthly payments simply because they made a large
 lump sum payment;
- 7 2) Defendant Barry Cohen ("Cohen") never expressed to Del Mar that he wanted his
 \$175,000 payment to pre-pay his monthly obligations under the Note;
- 8 3) California Civil Code section 1479 entitles Del Mar to apply the payment towards
 interest and principal with no prepayment of defendants' monthly obligation;
- 9 4) if Cohen had prepaid his monthly payments through February 2009, why did he
 make additional payments in January, February and March, 2007?
- 10 5) the defendant admitted that he had not made any monthly payments from
 December, 2005 through December, 2006, and after March, 2007.

11 Furthermore, this Motion for Leave is made on the basis of Local Rule 7-9 (b)(2)

12 whereby defendant has just revealed to plaintiff that the insurance certificate on the Vessel
 13 fails to state by its terms that any proceeds due under the policy "be payable to Mortgage[e]"
 14 for account of Mortgage[e] and Owner as their respective interests may appear . . ." Mortgage
 15 at ¶ 3. In other words, Del Mar, as Mortgagee, must be named as an additional assured/loss
 16 payee under the policy, at least in the amount outstanding under the Note. The policy that
 17 defendant has submitted to the Court does not show Del Mar named as an additional assured
 18 or loss payee and, under Paragraph 3 of the Mortgage, and Article 2 ("Default"), para. 1(a),
 19 this constitutes a default by defendants. Under Article 2, para. 1(b)(a) plaintiff is entitled to
 20 accelerate the principal and interest due on the Note making the full amount due and payable
 21 forthwith.

22 Plaintiff intends to provide notice to defendants that the amounts due under the Note

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1 are now accelerated and will amend the Complaint to allege the same. Furthermore,
 2 subsequent to the filing of the Complaint, plaintiff has become aware of additional grounds
 3 for default.

4 1. **Under The Terms Of The Note And Mortgage The \$175,000 Lump Sum**
 5 **Payment By Defendants In November 2004 Did Not Relieve Them Of Their**
 6 **Obligation To Make Monthly Payments**

7 The Promissory Note provides in its opening paragraph that payments are to be
 8 applied to interest first and that *payments must be made “on the 15th day of each succeeding*
 9 *month until principal and interest are fully paid.” See,* Promissory Note attached as **Exhibit**
 10 A to the concurrently filed Declaration of Max L. Kelley (“Kelley Dec.”). There is no
 11 provision in either the Note or Mortgage that allows for modification of this essential term.
 12 Mr. Cohen’s declaration filed in support of the motion to vacate the arrest does not state that
 13 he ever asked for or obtained Del Mar’s agreement to modify this term of the Promissory
 14 Note. In paragraph 11 his declaration Cohen states that he made the \$175,000 lump sum
 15 payment to Del Mar with the “*expectation* that . . . the payment comprised advance monthly
 16 payments into the future.” Cohen further declares that “[i]t was my *understanding* that this
 17 payment (and the earlier one) reduced the total amount of the debt from \$215,000 to
 18 \$35,000” and that “monthly payments were covered well into the future...” Declaration of
 19 B. Cohen in Support of Defendant’s Motion to Vacate Arrest, ¶ 11 (emphasis added),
 20 attached as **Exhibit B** to Kelley Dec. Mr. Cohen never declared that Del Mar agreed with
 21 his unilateral *understanding* or *expectation*. Simply put, Mr. Cohen has submitted no
 22 evidence that Del Mar agreed to an oral modification of the terms of the Promissory Note
 23 requiring ongoing payments in “each succeeding month until principal and interest are fully
 24 paid.” Del Mar has repeatedly disputed Mr. Cohen’s version and has denied that it agreed to
 25 any such oral modification of the Promissory Note.

26 2. **California Civil Code Section 1479 Entitled Del Mar To Apply The \$175,000**
 27 **Lump Sum Payment To The Note’s Interest And Principal**

28 California Civil Code Section 1479 provides that unless the debtor (Cohen) manifests

1 his intention or desire as to how his payments are to be applied to his debts, the creditor (Del
 2 Mar) "may apply it toward the extinction of *any obligation, performance of which was due to*
 3 *him from the debtor at the time of such performance . . .*" (emphasis added). As noted
 4 above, Mr. Cohen's declaration filed in support of the motion to vacate the arrest does not
 5 evidence that he manifested *any* intention at the time that he made the \$175,000 payment,
 6 much less manifested his expectation that the payment would prepay his monthly obligations.
 7 Rather, his declaration sets forth only his "expectation" and his "understanding." Without
 8 first having learned from Mr. Cohen that he wanted the payment to prepay his monthly
 9 obligations, Del Mar was entitled by the Promissory Note to apply it towards the interest and
 10 principal only.

11 3. **If Cohen Prepaid His Monthly Obligations Through February 2009, Why Did**
 12 **He Make Additional Monthly Payments In January, February And March**
 13 **2007?**

14 Cohen has claimed that his \$175,000 lump sum payment to Del Mar in November
 15 2005 prepaid his monthly obligations through February 2009. Cohen Dec., ¶ 15. Why then
 16 did he make additional monthly payments in January (\$2,000), February (\$3,000), and March
 17 (\$3,000), 2007? His declaration states that "after being asked by Joe Roggio to make
 18 payments on what I owed, but did not specify any amount or for what." This begs the
 19 questions: why didn't Cohen ask Mr. Roggio the amount he should pay and for which
 20 obligation, and *why didn't Cohen tell Mr. Roggio that he had prepaid his monthly*
 21 *obligations through February 2009?* The fact that Cohen made monthly payments in
 22 February and March, 2007 equal to his monthly obligation under the Note (\$3,000), and a
 23 \$2,000 payment in January 2007, was not considered by the Court and refutes Cohen's claim
 24 that the \$175,000 payment prepaid his monthly obligations under the Note through February
 25 2009.

26 Because Cohen's large payment in November 2005 did not relieve him of his
 27 obligation to continue making monthly payments, his failure to make any such payments in
 28 2006 and in April, May and June 2007 clearly resulted in his being in default. The Court's
 Order states "[plaintiff has] also failed to establish that defendants were behind on that

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1 \$3,000 per month schedule . . ." However, by defendant's own admission, he made no
 2 monthly payments in 2006, or after March 2007. Cohen Dec., ¶ 14 (**Ex. B** to Kelley Dec.).
 3
 4 **4. Plaintiff Has Learned Today That Defendants Are In Default Under The Terms**
Of The Mortgage For Failing To Have The Insurance On The Vessel Naming
Del Mar As An Additional Assured Or Loss Payee
 5

6 At 11:13 a.m. today, August 21, 2007, counsel for plaintiff received an e-mail with a
 7 link to plaintiff's insurance policy covering the Vessel that was filed with the Court. Kelley
 8 Dec., ¶ 4, and **Exhibit C**. That policy names the assured, the owner of the Vessel, "F/V Point
 9 Loma Fishing Co., Inc.," as the only assured and loss payee under the policy. This is a direct
 10 violation of the requirement in Paragraph 3 of the Mortgage requiring the defendant/
 11 mortgagor to obtain insurance on the Vessel that is "payable to Mortgage[e] for account of
 12 Mortgage[e] and Owner as their respective interests may appear . . ." Kelley Dec., **Exhibit D**,
 13 ¶ 1(a). That is, the insurance covering the Vessel is required to name Del Mar as an
 14 additional assured and/or loss payee. Such an endorsement is normally required under a ship
 15 mortgage to ensure that if anything were to happen to the vessel subject to the policy of
 16 insurance, the Mortgagee's interest in the vessel would be protected and it would be entitled
 17 to recover directly from the insurer under the policy.

18 Because the defendants are therefore in default, under Article 2, para. 1(b)(a) of the
 19 Mortgage, plaintiff is entitled to accelerate the principal and interest due on the Note making
 20 the full amount due and payable forthwith.

21 Plaintiff will provide notice to defendants that the amounts due under the Note are
 22 now accelerated and due and will amend the Complaint to allege the same. Furthermore,
 23 subsequent to the filing of the Complaint, plaintiff has become aware of additional grounds
 24 for default.

25 The failure of defendants to name plaintiff as an additional assured/loss payee on the
 26 insurance policy covering the Vessel evidences a clear default by defendants under the terms
 27 of the Mortgage, and was not before the Court at the hearing on defendants' motion to vacate
 28 the arrest. Plaintiff requests that this additional information be considered by the Court in

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determining whether to grant leave to Plaintiff to file a motion for reconsideration.

II. CONCLUSION

For the reasons discussed above, Plaintiff believes there are numerous grounds under Local Rule 7-9 (b) to find that good cause exists for granting Plaintiff leave to file a motion for reconsideration of the Court's Order dated August 17, 2007 vacating the arrest of the Vessel.

Respectfully submitted,

Dated: August 21, 2007

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Max L. Kelley

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